

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF (SAJ)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S OMNIBUS MOTION REGARDING
DEFICIENCIES IN DEFENDANTS' RESPECTIVE
ESI RESPONSES AND INTEGRATED BRIEF IN SUPPORT**

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), pursuant to the directive in this Court's August 20, 2007 Minute Order [DKT # 1246]¹, moves this Court for an order requiring Defendants to remedy the deficiencies outlined below in their respective ESI responses:

1. Defendants have all failed to produce copies of and / or make available to the State databases containing responsive ESI in its native format. Rather, to the extent they have even made productions, Defendants have merely produced print-outs from databases. Not only are these print-outs not reasonably usable given the manner in which they have been produced, but they also deprive the State of one of the principle values of databased information -- namely the ability to sort and organize data according to the user's needs based upon queries and

¹ A number of the issues addressed herein have been raised with the respective Defendants. However, the meet and confer process is ongoing and not yet complete. Therefore, this motion has not been styled as a motion to compel, but rather it is intended to apprise the Court of outstanding issues surrounding the Defendants' ESI productions, as requested by the Court.

searches. In fact, the Advisory Committee Notes to the 2006 Amendment to Fed. R. Civ. P.

34(a) provide that:

If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. Rule 34(a) requires that, if necessary, a responding party "translate" information it produces into a "reasonably usable" form. Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information. The rule does not require a party to produce electronically stored information in the form in which it is ordinarily maintained, as long as it is produced in a reasonably usable form. But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.

(emphasis added.) Simply put, the failure of Defendants to produce responsive databases in native format has made it more difficult and burdensome for the State to extract and use the information efficiently in the litigation.

2. Defendants also have failed to produce copies of and / or make available to the State responsive e-mail messages in native file format. Rather, to the extent they have made productions, Defendants have merely produced print-outs or scanned images of e-mail messages. Had the e-mail been produced in native format, it would be easily searchable by various categories such as date, author, recipient, and subject. The content of the email would also be easily searchable. As produced by Defendants however, the e-mail is not easily searchable. Despite the efforts of some Defendants to provide alternative mechanisms to make the scanned images of email messages searchable, the State's ability to search and navigate the email is significantly impaired from what it would have been had the email been produced in native

format. For example, although Defendant Peterson provided an Excel spreadsheet, and the George's Defendants provided a "metadata chart" listing the email messages produced, these charts only allow searches by certain categories, and the content of the email is not searchable. Then, once one identifies an email to view, one must use these charts to cross-reference the emails, which then must be located and pulled up in their image format on disks. This is a time consuming and cumbersome process. The formats of these productions are contrary to the Rules. *See* Advisory Committee Notes to the 2006 Amendment to Fed. R. Civ. P. 34(a) ("If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature").

3. In addition, Defendants have failed to produce all responsive ESI. While it is obviously difficult to prove a negative, the State's review of Defendants' ESI productions to date reveal that they are notably sparse as to ESI predating 2001. Additionally, the State's review of Defendants' ESI productions to date reveals that they are lacking in a number of areas for which responsive materials would be expected. For example, Defendants have not produced all responsive documents pertaining to their knowledge of the environmental and health effects of poultry waste run-off outside the Illinois River Watershed consistent with this Court's July 6, 2007 Order, [DKT #1207].

4. Finally, to date, none of the Defendants have confirmed that they have completed production of their ESI. Thus, the State requests that a reasonable deadline be set for completion of the Defendants' ESI productions for discovery requests that have already been responded to. Specific deficiencies identified in the Defendants' ESI productions to date are outlined below.

Cal-Maine Defendants

5. The Cal-Maine Defendants stated in their July 29, 2007 letter to the State that they would not be producing *any* ESI. Counsel for the Cal-Maine Defendants has represented that computers which may have contained responsive ESI were purged and donated to schools when the Cal-Maine Defendants closed their Arkansas facility in January 2005. However, the Cal-Maine Defendants have failed to explain whether their corporate headquarters or other facilities contain ESI responsive to the State's document requests. Despite the closure of the Cal-Maine Defendants' Arkansas facility, it seems highly probable that the corporate headquarters would have maintained responsive information about production from the Arkansas facility, and that such information likely would be maintained in an electronic system. Furthermore, email messages would also have been sent to and from the Arkansas facility to corporate headquarters and thus would be maintained at corporate headquarters as well as the former Arkansas facility.

Cargill Defendants

6. It has recently come to light that the Cargill Defendants failed to identify all systems containing electronically stored information in previous discussions regarding the production of electronically stored information. On July 2, 2007, the Cargill Defendants produced a schematic of very large databases, CART103889-905², which appear to be Microsoft Access accessible. The schematic reflects tables identifying significant search capabilities and categories of information responsive to the State's discovery. It is evident from this schematic that the Cargill Defendants have a huge amount of available data that can be searched to provide the information responsive to the State's discovery requests in a usable manner. However, rather

² Because these images have been designated as "Confidential," pursuant section 6 of the confidentiality order [DKT #985] the State will submit these pages to the Court for *in camera* review at the September 27, 2007 hearing.

than make databases containing responsive information available to the State in native format, or some other reasonable usable and searchable format, the Cargill Defendants have provided limited information from these databases in piecemeal fashion, providing only partial information that is extremely difficult to use.

7. For example, on July 2, 2007, Cargill finally produced some information regarding birds produced in the IRW that appears to be gathered from a database³. This information was initially requested in April 2006 by the State. The data produced appears to be from a database maintained by the Cargill Defendants since prior to the State's request, and no explanation has been offered as to why it has taken the Cargill Defendants so much time to produce this information. The Cargill Defendants refuse to produce the same database in native format. The information was produced in hard copy, and scanned to a TIFF image format, and provided with no representation as to accuracy and with reservation to object to its use at trial.

8. The databases the Cargill Defendants have produced have not been produced as they are kept in the ordinary course of business, and the Cargill Defendants have failed to produce these databases in reasonably usable formats. The Cargill Defendants method of performing unidentified searches in its unidentified databases, then printing selected portions of these searches, then scanning these images for production to the State, manipulates what appears to be a very thorough and advanced database system, and forces it into a completely unusable format. Specific examples of this are contained in Cargill's production at CARTP098581-596⁴. These documents appear to be searches of databases, which were printed onto oversized paper,

³ Because these images have been designated as "Confidential -- Attorneys Eyes Only," pursuant to section 6 of the confidentiality order [DKT #985] the State will submit these pages to the Court for *in camera* review at the September 27, 2007 hearing.

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the paper was then cut into pieces, the pieces were scanned, and the scanned images were produced to the State. This means that the State must print out the pages, tape them together, and then try to understand the information presented therein (hoping that the pages are in the correct order and that no columns have been lost in the scanning, printing, and taping procedure). This method for producing ESI is immensely cumbersome and inefficient, and clearly not within the requirements set forth for ESI production in Rule 34.

9. Finally, the Cargill Defendants' ESI productions have been intentionally incomplete in that they are limited to only turkey production and do not include other relevant, requested information. For example, Cargill operated a fertilizer division for years, but refuses to produce any data or other ESI related to that division as requested in the States July 10, 2006 Requests for Production.

George's Defendants

10. The George's Defendants have not produced their databases containing responsive information as they are kept in the ordinary course of business, and they have failed to produce these databases in a reasonably usable format. In providing information from its databases, the George's Defendants selected what data to provide, the form in which to provide it, and then produced the ESI in non-searchable TIFF format. It is the State's understanding that the George's Defendants have an Oracle-based relational database with custom design. Reports can be created by pulling data from the database, which is stored in a Laser Vault system. The George's Defendants reported on February 2, 2007 they were preparing to migrate from one system to another, thus making historical data dating from the mid 1990's on the old system non-accessible. Regardless of outstanding discovery requests from the State, the George's

Defendants refused to provide the responsive ESI from this system prior to the information becoming inaccessible.

11. The George's Defendants produced email as part of their ESI production, which they produced in TIFF image files, rather than native file format. In addition to the images, a "metadata" file in Microsoft Excel format was provided to the State on August 24, 2007. This separate "metadata" production provides some, but not all, of the fields that one would see contained in a document such as "To", "From", "CC," "Subject," and "Author" in a searchable format. However, most of these metadata files do not identify the Bates number of the document and the contents of the document or email are not included. Thus, one cannot find the produced image without referring to a list that will cross reference the Bates number to the file image number. The George's Defendants have stated they would attempt to correct the error of not listing the Bates numbers in the "metadata" material, but have not yet done so. More troublesome is the fact that the body or content of the ESI image is not included in this metadata file, thus it is not searchable as it would be in its native format. The George's Defendants have explained that they use Windows Exchange Outlook for its email system, which can be produced in fully searchable native file format, but the George's Defendants refuse to produce this ESI in this native format, opting instead for the separate metadata file which is significantly less usable and thus far has proved to be ineffective.

Defendant Peterson

12. Defendant Peterson's initial ESI production contained 660 images responsive to limited topics in the State's discovery. On September 4, 2007, Defendant Peterson produced a supplement to its ESI production. Like the George's Defendants, Defendant Peterson has produced a "load file" which is similar to an index, and which is supposed to enable searches of

the scanned images that have been produced. Like the George's Defendants' and Cargill Defendants' productions, this file does not improve upon the usability or searchability of the ESI production and it requires one to go through the separate exercise of locating the images on the disks once they are identified on the index.

13. Defendant Peterson explained that it maintains accounting data on its computer system back to 1982, broiler settlement history to 1982, and its hen and pullet history back to 1987. Defendant Peterson represented to the State its accounting data would include production data. Defendant Peterson has not represented that this data is not accessible. Defendant Peterson has not represented queries could not be made on the data to extract the information responsive to the State's request for the period of its data retention. However, to date, usable ESI regarding settlement history for broilers, hens, and pullets has not yet been produced. In the limited ESI that Defendant Peterson has produced, it has not produced the ESI as it is maintained in the ordinary course of business, and it has failed to produce the ESI in a reasonably usable format. The documents prepared from its electronic database thus far have been scanned and produced in non-searchable TIFF format.

Defendant Simmons

14. Defendant Simmons was unable to make a complete disclosure in January 2007 and its promise to follow up with omitted material has not been completed. To date, Defendant Simmons has not produced any email. Defendant Simmons has also not produced any databases in native format or reasonable usable formats. Defendant Simmons stated in the January 2007 ESI disclosure meeting that it could run a report to determine production information requested in the State's discovery, but it did not produce the information until the 30(b)(6) deposition on July 30, 2007, and at that time, the information was produced solely in a list containing some

typed and some handwritten notes. Thus, it appears that Defendant Simmons has the ability to collect data responsive to the State's discovery requests, but has failed to do so and has failed to produce it in a reasonably usable and searchable format.

Tyson Defendants

15. For the July 2, 2007 ESI deadline, the Tyson Defendants produced a disk containing email messages and attachments. The Tyson Defendants' ESI production has been noticeably sparse on information referring or relating to, without limitation, poultry feed formulae, knowledge of the environmental and health effects of poultry waste run-off, and poultry production. It appears that the Tyson Defendants ESI production thus far has been limited to certain individual's email accounts, and limited to certain topics, including the hauling of poultry waste, the BMPs litter hauling program, and financing for the BMPs program. Furthermore, the ESI produced to date is limited in terms of time. With a handful of exceptions, the majority of the email messages produced are from the 2005-2006 timeframe, and no email messages have been produced that predate 2001. Counsel for Tyson advised the State it would supplement its ESI production on September 10, 2007, and then counsel for Tyson extended this date to Sept 20, 2007. Thus, at the time this motion is being filed, Tyson's ESI production remains incomplete.

16. The Tyson Defendants have also failed to produce ESI from databases responsive to the State's discovery requests. For example, the first interrogatory filed by the State in April 2006 requested information about the number of birds Tyson produced in the watershed. Despite the State's best efforts to work with Tyson to obtain this information from its electronic systems and reach a reasonable compromise, Tyson has not yet provided the responsive ESI requested

numerous times by counsel for the State. *See e.g.* Ex. 1, (correspondence between counsel regarding this request).

Conclusion

17. For the reasons set forth above, the Defendants' ESI productions to date have been incomplete and the formats in which they have been produced have been not been reasonably usable.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
Attorney General
Kelly H. Burch OBA #17067
J. Trevor Hammons OBA #20234
Tina Lynn Izadi OBA #17978
Assistant Attorneys General
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

/s/ Richard T. Garren

M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Douglas A. Wilson OBA #13128
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
Riggs, Abney, Neal, Turpen,
Orbison & Lewis
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

James Randall Miller, OBA #6214
Louis Werner Bullock, OBA #1305
Miller Keffer & Bullock
222 S. Kenosha
Tulsa, Ok 74120-2421
(918) 743-4460

David P. Page, OBA #6852
Bell Legal Group
222 S. Kenosha
Tulsa, OK 74120
(918) 398-6800

Frederick C. Baker
(admitted *pro hac vice*)
Lee M. Heath
(admitted *pro hac vice*)
Elizabeth C. Ward
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice*)
Motley Rice, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold
(admitted *pro hac vice*)
Ingrid L. Moll
(admitted *pro hac vice*)
Motley Rice, LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676

Jonathan D. Orent
(admitted *pro hac vice*)
Michael G. Rousseau
(admitted *pro hac vice*)
Fidelma L. Fitzpatrick
Motley Rice, LLC
321 South Main Street
Providence, RI 02940
(401) 457-7700

Attorneys for the State of Oklahoma

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 2007, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

Frederick C Baker fbaker@motleyrice.com, mcarr@motleyrice.com;
fhmorgan@motleyrice.com

Michael R. Bond michael.bond@kutakrock.com, amy.smith@kutakrock.com

Vicki Bronson vbronson@cwlaw.com, lphillips@cwlaw.com

Paula M Buchwald pbuchwald@ryanwhaley.com

Louis Werner Bullock LBULLOCK@bullock-blakemore.com, NHODGE@bullock-blakemore.com;

Gary S Chilton gchilton@hcdattorneys.com

Robin S Conrad rconrad@uschamber.com

W A Drew Edmondson fc_docket@oag.state.ok.us, drew_edmondson@oag.state.ok.us;
suzy_thrash@oag.state.ok.us.

Delmar R Ehrich dehrich@faegre.com, etriplett@faegre.com; ; qsperrazza@faegre.com

John R Elrod jelrod@cwlaw.com, vmorgan@cwlaw.com

Fidelma L. Fitzpatrick ffitzpatrick@motleyrice.com

Bruce Wayne Freeman bfreeman@cwlaw.com, lclark@cwlaw.com

D. Richard Funk rfunk@cwlaw.com

Richard T Garren rgarren@riggsabney.com, dellis@riggsabney.com

Dorothy Sharon Gentry sgentry@riggsabney.com, jzielinski@riggsabney.com

Robert W George robert.george@kutakrock.com, sue.arens@kutakrock.com;
amy.smith@kutakrock.com

James Martin Graves jgraves@bassettlawfirm.com

Tgrever@lathropgage.com

Jennifer Stockton Griffin jgriffin@lathropgage.com

John Trevor Hammons thammons@oag.state.ok.us, Trevor_Hammons@oag.state.ok.us; Jean!_Burnett@oag.state.ok.us

Lee M Heath ! lheath@motleyrice.com

Theresa Noble Hill thillcourts@rhodesokla.com, mnave@rhodesokla.com

Philip D Hixon phixon@mcdaniel-lawfirm.com

Mark D Hopson mhopson@sidley.com, joraker@sidley.com

Kelly S Hunter Burch fc.docket@oag.state.ok.us, kelly_burch@oag.state.ok.us;
jean_burnett@oag.state.ok.us

Tina Lynn Izadi; tina_izadi@oag.state.ok.us

Stephen L Jantzen sjantzen@ryanwhaley.com, mantene@ryanwhaley.com;
loelke@ryanwhaley.com

Bruce Jones bjones@faegre.com, dybarra@faegre.com; jintermill@faegre.com;
cdolan@faegre.com

Jay Thomas Jorgensen jjorgensen@sidley.com

Raymond Thomas Lay rtl@kiralaw.com, dianna@kiralaw.com

Krisann C. Kleibacker Lee; kkleee@faegre.com

Nicole Marie Longwell Nlongwell@@mcdaniel-lawfirm.com

Archer Scott McDaniel smcdaniel@mcdaniel-lawfirm.com

Thomas James McGeady tjmcgeady@loganlowry.com

James Randall Miller rmiller@mkblaw.net, smilata@mkblaw.net; clagrone@mkblaw.net

Charles Livingston Moulton Charles.Moulton@arkansasag.gov,
Kendra.Jones@arkansasag.gov

Indrid Moll; imoll@motleyrice.com

Robert Allen Nance rnance@riggsabney.com, jzielinski@riggsabney.com

William H Narwold bnarwold@motleyrice.com

Jonathan Orent ; jorent@motleyrice.com

George W Owens gwo@owenslawfirmpc.com, ka@owenslawfirmpc.com

David Phillip Page dpage@edbelllaw.com, smilata@edbelllaw.com

Robert Paul Redemann rredemann@pmrlaw.net, scouch@pmrlaw.net

Melvin David Riggs driggs@riggsabney.com, pmurta@riggsabney.com

Randall Eugene Rose !rer@owenslawfirmpc.com, ka@owenslawfirmpc.com

Michael Rousseau ; mrousseau@motleyrice.com

Robert E Sanders rsanders@youngwilliams.com,

David Charles Senger dsenger@pmrlaw.net, scouch@pmrlaw.net; ntorres@pmrlaw.net

Paul E Thompson , Jr pthompson@bassettlawfirm.com

Colin Hampton Tucker chtucker@rhodesokla.com, scottom@rhodesokla.com

John H Tucker jtuckercourts@rhodesokla.com, lwhite@rhodesokla.com

Elizabeth C Ward lward@motleyrice.com

Sharon K Weaver sweaver@riggsabney.com, lpearson@riggsabney.com

Timothy K Webster twebster@sidley.com, jwedeking@sidley.com

Gary V Weeks !

Terry Wayen West terry@thewestlawfirm.com,

Edwin Stephen Williams steve.williams@youngwilliams.com

Douglas Allen Wilson Doug_Wilson@riggsabney.com, pmurta@riggsabney.com

P Joshua Wisley ; jwisley@cwlaw.com, jknight@cwlaw.com

Elizabeth Claire Xidis cxidis@motleyrice.com

Lawrence W Zeringue lzeringue@pmrlaw.net, scouch@pmrlaw.net

Also on this 17th day of September, 2007 I mailed a copy of the above and foregoing pleading to:

David Gregory Brown
Lathrop & Gage LC
314 E HIGH ST
JEFFERSON CITY, MO 65101

Thomas C Green
Sidley Austin Brown & Wood LLP
1501 K ST NW
WASHINGTON, DC 20005

Cary Silverman
Victor E Schwartz
Shook Hardy & Bacon LLP (Washington DC)
600 14TH ST NW STE 800
WASHINGTON, DC 20005-2004

C Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 NORTH CLASSEN
OKLAHOMA CITY, OK 73118

/s/ Richard T. Garren
Richard T. Garren